MALAYAN BANKING BHD

v.

ASSOCIATION OF MAYBANK CLASS ONE OFFICERS & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING MOTION NO: R1-25-147-1998]
2 OCTOBER 2001

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application to quash award of Industrial Court - Whether Industrial Court committed errors of law - Whether there was failure by Industrial Court to consider relevant facts and evidence - Whether award of Industrial Court irrational*

This was an application by Malayan Banking Berhad ('the bank') to set aside an award of the Industrial Court by way of *certiorari* on the ground that the Industrial Court had committed errors of law in failing, principally, to provide a legal basis for its decision. This award concerned the acting allowance of class one officers of the bank, which the bank contended could only be given if the acting officer performs all the duties of the person he is acting on a full time basis. The bank averred that the Industrial Court had not considered evidence led by the bank nor given reasons for not accepting the evidence, thus revealing a fatal flaw in the decision-making process of the Industrial Court.

Held:

[1] The Industrial Court moulded an award for the acting allowance without there being a factual basis on which to do so. If the Industrial Court had investigated, analysed and come to a finding of facts, it would have realised that there was no evidence at all of an officer, who was assigned to act in a higher grade, having to perform the full duties and assuming the full responsibilities of that position, which would only then entitle that officer to an acting allowance.

[2] A vital and valid criticism that could be made against the award was that the Industrial Court had failed to show an awareness of the facts of the case. There had been a setting down of the contentions of the parties and of the principles involved but there were no findings of facts in relation to them. There were no reasons given as to why the Industrial Court gave the award in the terms that it did.

[Application allowed.]

Case(s) referred to:

Burn & Co v. Their Workmen & Ors AIR [1959] SC 529 ***(refd)***

Malayan Banking Bhd v. Association Of Maybank Class One Officers & Anor [1998] 3 ILR 758 ***(refd)***

Malayan Banking Bhd v. Association Of Maybank Class One Officers & Anor [1994] 1 ILR 85 ***(refd)***

Nestle Food (M) Sdn Bhd v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan [1995] 1 ILR 249 ***(refd)***

R. Rama Chandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 ***(foll)***

Standard Chartered Bank Malaysia Bhd v. Kesatuan Pegawai-pegawai Kebangsaan Standard Chartered Bank [1997] 2 ILR 971 ***(refd)***

Viking Askim Sdn Bhd v. National Union of Employees in Companies Manufacturing Rubber Products [1991] 2 MLJ 115 ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, ss. 26(1), 30(4), (5), (6)

For the applicant - Ramesh Abraham (Steven Thiru); M/s Shook Lin & Bok
For the 1st respondent - A Murugavell; M/s Murugavell Arumugam & Co

Reported by Suresh Nathan

JUDGMENT

KC Vohrah J:

It is recognised that the Industrial Court has power to create new rights and obligation under s. 30 of the Industrial Relations Act 1967 (the Act). As was pointed out by Edgar Joseph Jr J (as he then was) in *Viking Askim Sdn Bhd v. National Union of Employees in Companies Manufacturing Rubber Products* [1991] 2 MLJ 115 at 122:

> .. I am satisfied that the power of the Industrial Court to create new rights and obligation is derived from sub ss. (4)(5) and (6) of s. 30 of the Industrial Relations Act 1967 ... though it goes without saying that this power is a power which must be exercised reasonably and not arbitrarily.

Under a joint request relating to a trade dispute under s. 26(1) of the Act and the reference of the Minister of the dispute to the Industrial Court, the Industrial Court had to determine the following issues raised by Malayan Banking Berhad (the bank) and the Association of Maybank Class One Officers (the union):

> Firstly, on liability -
>
> Is the bank, as an employer, liable to pay the benefits known as "acting allowance" and "relief allowance" to its class one officers;

Secondly, on quantum - *a*

How are the benefits to be computed, what is the quantum of payment and what is the qualifying period for the payment.

On the first issue on liability, the court found the bank liable to pay.

b

On the second issue as regards quantum, the court held that the rate for the acting/relief allowance should be RM75 per day with effect from 1 March 1993 and stated that the court did not propose any qualifying period of days for an officer to become eligible for the allowance.

The bank has sought to set aside the award, *Malayan Banking Bhd v. Association Of Maybank Class One Officers & Anor* [1998] 3 ILR 758 of the Industrial Court (the award), by way of *certiorari* on the ground that the Industrial Court had committed errors of law in failing, principally, to provide a legal basis for its decision. *c*

d

The dispute referred to the Industrial Court relates to the claim by the union for acting allowances and relief allowances as part of the terms and conditions of service for the period 1 March 1993 to 28 February 1996 in respect of class one officers of the bank within the scope of a collective agreement between the parties for the period. The collective agreement is a consent award of the Industrial Court, *Malayan Banking Bhd v. Association Of Maybank Class One Officers & Anor* [1994] 1 ILR 85, handed down on 31 January 1994. *e*

Both parties had at the time of consenting to the collective agreement agreed that the dispute over the union's claim for the acting allowance and the relief allowance be negotiated further with a view to incorporating the same into the collective agreement failing which the matter could be adjudicated upon by the Industrial Court on a joint request for reference after which the decision in respect of those allowances could be incorporated into the collective agreement. *f*

It was noted by the Industrial Court that at the time of the parties agreeing to the collective agreement there was in existence a similar dispute between Standard Chartered Bank and Kesatuan Pegawai-Pegawai Kebangsaan Standard Chartered Bank then pending in the Industrial Court and that the parties had agreed to await the outcome of the aforesaid case before commencing negotiation on the allowances. The Standard Chartered Bank matter ended in *Malayan Banking Bhd v. Association Of Maybank Class One Officers & Anor* [1994] 1 ILR 85. Thereafter the parties in this case, the bank and the union, entered into negotiations relating to the said allowances but were unable to reach any agreement and consequently the parties jointly requested the matter to be referred to Industrial Court. *g* *h* *i*

The Industrial Court dealt with the union's statement of case and the bank's statement of reply in the award. In respect of the claims in the statement of case the court observed:

> The Union's claims in the Statement of Case in respect of the Acting/Relief Allowance are as follows:
>
> (i) When an officer is assigned to act in a higher grade or position on a temporary basis, whether in addition to his normal duties or otherwise for a period of a full day or more, he will be paid an Acting/Relief Allowance provided that:
>
> a. the officer performs the full duties and assumes the full responsibilities of that position; when he is not required to perform his normal duties.
>
> b. The officer, if required to perform his normal duties in addition to the duties he assumes, the extent of the duties he assumes should be discussed with the next senior manager.
>
> c. Only one (1) officer shall be eligible to claim the Acting/Relief Allowance for any one (1) vacant position at any one time;
>
> (ii) Relief Allowance shall also be payable when an officer relieves another officer of the same grade or lower provided the officer undertakes the relief in addition to his normal duties. The allowance is not payable in the event the officer does not perform his normal duties when carrying out such relief work.
>
> (iii) The rate of Acting/Relief Allowance shall be RM200.00 per day.

In respect of the bank's statement of reply the court observed:

> The Bank in the Statement in Reply admitted that the nature of the job functions of Class One Officers of the Bank would require them to act in key positions such as Head of Sections and Departments, Assistant Bank Managers and Bank Managers in cases of prolonged absence of the incumbents of those positions but contended that they are not in normal circumstances required to act for more than 14 days at any given time. This, the Bank contended, is a crucial and necessary step in the officers career development but that they do not perform all the duties of the absent incumbents as the duties are usually distributed and jointly performed by a number of employees. The Bank also contended that when there is a need to relieve a fellow Class One Officer of the same or lower grade again the responsibilities and duties of the absent person is shouldered by more than one person.

It is to be noted that the Industrial Court set out the bank's position in the dispute that the main pre-requisite in a claim for an acting allowance is that the employee performs all the duties of the higher rank on a full time basis with the emphasis being on "all" and "full time" and that for a relief allowance the bank's stand is that this concerns relieving persons in a similar or lower

grade and that consequently the pre-requisite referred to by the bank for the acting allowance would be equally applicable to the relief allowance. This is equally the contention of the bank in this court and the principles are not disputed by the union.

It was submitted before the Industrial Court and before this court by the bank that the rationale for the requirement for an acting or relieving employee to perform all the functions on a full time basis on behalf of the person he is acting for or relieving is that an employee should not receive additional payment for work that he is already being paid for and that the additional payment for the allowance would be double compensation for the work undertaken. The union disputes there is double compensation involved.

I have in this decision reverted to recounting the principal contentions before the Industrial Court which were noted by the said court as they are germane to the understanding of the major criticism of the award of the Industrial Court. They are basically the same contentions before this court.

The Industrial Court observed, and this is not challenged before me - in fact they have largely been raised again before this court - that the bank did not dispute that the affected officers of the bank are called upon to perform both acting and relief functions but had submitted that some flexibility had been built into the job positions in respect of the functions and responsibilities to be performed which thereby make the acting and relieving an integral part of the contracts of employment of the affected officers. The bank argued that although the officers perform acting and relief functions they do not assume all the responsibilities of the position they are acting in or relieving and further that the acting or relieving is not on a full time basis and that this does not warrant them being paid any acting or relief allowance.

The bank adverted to the principle referred to in an Indian case, *Burn & Co v. Their Workmen & Ors* AIR [1959] SC 529 and the principle adopted by the Industrial Court in *Nestle Food (M) Sdn Bhd v. Kesatuan Pekerja-pekerja Perkilangan Perusahaan Makanan* [1995] 1 ILR 249.

The bank puts particular stress on the principle stated by another panel of the Industrial Court in *Nestle Food (M) Sdn Bhd* in regard to an acting allowance:

> ... the allowance is only payable if the employee is required to perform the full responsibilities of the job in the higher category and on full-time basis and is not payable to employees who are categorised as Relief Operators.

The bank obviously regards that an acting allowance can only be given if the employee acting in a higher rank performs all the duties of the higher rank and that that must be done on full time basis. But I have to point out that the bank also relied on *Burn & Co* where the Supreme Court of India though

it rejected an award for acting allowance made by an Industrial Tribunal in the case before it because it did not follow existing rules, implicitly recognised the principle accepted by the Tribunal in respect of acting allowance in that acting allowance is payable because the acting man does practically the same work as was done by the person for whom he was acting and the company derived benefit from his work.

As far as the above principles concerning acting allowances are concerned and the bank concedes they can be adopted, the award made by the Industrial Court in our case relating to acting allowances does spell out the criteria that there must be the performance of "full duties" and the assumption of "full responsibilities" in a "higher grade" for "a full day or more (full days)" and that only one officer shall be eligible for only one vacant post. In fact the criteria appear to be more onerous than the criteria recognised by the two cases.

As regards the relief allowance the bank argues that the basic principle applicable to a claim for an acting allowance would be equally relevant to a claim for the relief allowance save that in the case of an acting allowance the acting officer relieves someone in a higher grade while in the case of a relief allowance the relief officer relieves a person in a similar or lower grade.

It is with the foregoing in mind that one has to view what was awarded. The Industrial Court made an award "in respect of the terms of the acting/relief allowance to be incorporated" into the collective agreement, *Malayan Banking Bhd v. Association Of Maybank Class One Officers & Anor* [1994] 1 ILR 85, for the period commencing 1 March 1993 and numbered it as art. 19.9.

The terms awarded under art. 19.9 read as follows:

> 19.9 ACTING/RELIEF ALLOWANCE
>
> When an officer is assigned to act in a higher grade or position on a temporary basis whether in addition to his normal duties or otherwise for a period of a full day or more, he will be paid an Acting/Relief Allowance provided that:
>
> (i) the officer performs the full duties and assumes the full responsibilities of that position without being required to perform his normal duties, but if he is required to perform his normal duties in addition thereto then in such a case the extent of his duties he is to assume must be discussed and agreed upon with the next senior manager.
>
> (ii) Only one officer shall be eligible to claim the Acting/Relief Allowance for any one vacant position at any one time.
>
> (b) A Relief Allowance shall be payable when an officer relieves another officer of the same or lower grade for a period of a full day or more

provided that he undertakes to do the relief duties in addition to his normal duties. The allowance is not payable if the officer does not perform his normal duties when performing such relief work.

(c) The rate of Acting/Relief, Allowance payable shall be RM75 per full day.

It will be noted that the terms awarded under art. 19.9 incorporate more onerous terms than those recognised in *Burn & Co* and *Nestle Food (M) Sdn Bhd* and are the terms requested for in the union's statement of claim which were set out earlier in this decision and which were what the Industrial Court has obviously adopted save for the editing of some of the language and the substitution of RM75 for RM200 in respect of the rate of acting/relief allowance.

I do not think there is any quarrel over applicable principles for acting allowances or relief allowances. The issue is whether the Industrial Court is right in applying the principles to the particular facts of the case.

I will not go into the minutiae with which the bank has attacked the award. Suffice it to say, most of the grounds relied upon by the bank in challenging the award relate to showing that the Industrial Court had not considered evidence led by the bank nor given reasons for not accepting the same thus revealing a fatal flaw in the decision making process of the court.

It is settled that where a decision is challenged as being in error of law on the grounds of irrationality or illegality the supervisory court is empowered to review the decision for process and for substance: *R. Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147.

I am mindful, however, that the supervisory court can only review a decision on substance if the Tribunal has committed an error where:

(a) it relied upon an erroneous factual conclusion, or

(b) where there is no evidence to support its conclusion.

This is clearly shown in the words of Edgar Joseph Jr FCJ in *R. Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 at p. 214-215 in dealing with the point that it is not open to an appeal court to deal with a question of fact of the Industrial Court:

> This point appears to be supported by what Lord Brightman said in *R v. Hillingdon LBC, ex p Puhlhofer* [1986] AC 484 at p. 518D-E;
>
> > Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power ... .

However, like most principles, there are important exceptions, which tend to blur the conceptual distinction between errors of law and fact. Two of these exceptions which are relevant to the present case must be mentioned; they are:

(1) Reliance upon an erroneous factual conclusion may itself offend against the principles of illegality or irrationality enunciated by Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374. Indeed. In *R v. Hillingdon LBC, ex p Puhllhofer (ibid)*, Lord Brightman made this clear by adding to the passage in his judgment cited above, 'save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely'.

(2) Where there is no evidence to support a conclusion, there is necessarily an error of law in the decision arrived at (see *Edwards v. Bairstow* [1956] AC 14; *Din (Taj) v. Wandsworth LBC* at p. 664H, per Lord Wilberforce; *R v. Hillingdon LBC ex p Islam (Tafazzul)* [1983] 1 AC 688 at p. 708D, per Lord Wilberforce and at p 77G, per Lord Lowry).

In regard to "no evidence to support a conclusion" stated in the second exception Edgar Joseph Jr had this to add:

> But, as *Wade and Forsyth Administrative Law* (7th Edn, 1994) have correctly pointed out (at p 312), 'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding (see *Allinson v. General Council of Medical Education and Registration* [1984] 1 QB 750 at pp. 760, 763; *Lee v. The Showmen's Guild of Great Britain* [1951] QB 329 at p 345), or where, in other words, no tribunal could reasonably reach that conclusion on that evidence. (See *R v. Roberts* [1908] 1 KB 407 at p 423). This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and *ultra vires*.

The major criticism by the bank against the award is that the Industrial Court had not showed any awareness of the facts of the case: there was no investigation of the facts, no analysis of the facts, no findings on the facts. The bank points out that in actuality the facts did not support the making of the award.

I had earlier adverted to the fact that the Industrial Court had set out at great length the arguments of both parties as to the principles and the contentions that were involved in the case - a lot of attention was in fact paid to them in the ten pages of the award - and it is true that except for one instance there is no reference to the evidence of witnesses who were called to testify to the facts in dispute. Yet going on the terms of the award made by the Industrial Court it appears implicit that in relation to the acting allowance that the Industrial Court must have found as a fact that there were officers who had been assigned to act in a higher post or position and that there was evidence that the acting officer performed the "full duties" and assumed the "full

responsibilities" of that position for a full day or more full days for the court to have made such an award. And in regard to the relief allowance the court must have found that as a fact that there were officers who relieved officers of the same or lower grade and that a relieving officer relieved another officer for a period of a full day of more full days and that he undertook to do the relief duties in addition to his normal duties.

It will be noted that in the court the bank called two witnesses, COW1 and COW2 to give evidence while the union had one witness CLW1. Most of the evidence of COW1 and COW2 went to show the nature of the functions of class 1 officers and how while they "acted" for another on a higher grade or "relieved" another or the same or lower grade, the "acting" was for only some duties and the "relieving" of duties was shared by a few others in respect of the absent officer who was relieved and that flexibility had been built into the job functions and responsibilities to be performed making the acting and relieving an integral part of the contract of employment. CLW1 only gave evidence on relief work.

With respect it would appear that the Industrial Court, going by the award that it gave, did not show it took into account any evidence in the case except for the evidence of COW1, Mr Koh Moo Yang, head of the business process improvement department of the bank that an officer cannot refuse to do acting or relief work whether in a higher grade, similar grade or lower grade and that while thus acting or relieving the officer is responsible and accountable for the duties imposed upon him and further that he would be subject to disciplinary action should he be negligent or commit any errors.

But this bit of evidence does not show and in fact nowhere does COW1 or COW2 or CLW1 state that there had been an officer who was assigned to act on a higher grade or position and that such an acting officer performed "the full duties" and assumed "the full responsibilities of the position" (some of the stringent criteria spelt out in the award). Counsel for the union had adverted to the principle that an acting allowance is only payable when an officer is required to perform the full responsibilities of the job in the higher category and on a full time basis and he submitted that indeed there was sufficient evidence before the Industrial Court (i.e. that of COW2 and CLW1) that there were occasions, rare though it may have been, when that happened including when the "acting officer" had to report to another location to take up the duties of another officer. With respect he is mistaken. I have carefully gone through the evidence of COW1, COW2 and CLW1 which appears in the certified notes of proceedings of the Industrial Court (attached as exh. ST1 to the affidavit affirmed on 29 April 2000, encl. 14) and although the Industrial Court had stated without more "... we find the union had made out a case for the payment of acting/relief allowance for the affected officers" in fact I have not been able to see an iota of evidence in the evidence of the union's

sole witness CLW - nor at all in the evidence of the bank's two witnesses COW1 and COW2 to that effect in regard to the acting allowance. In other words, the Industrial Court moulded an award for the acting allowance without there being a factual basis on which to do that. If the Industrial Court had investigated these facts, made an analysis of the facts and come to a finding of facts the Industrial Court would have realised that there was no evidence at all of an officer being assigned to act in a higher grade having to perform the full duties and assuming the full responsibilities of that position without being required to perform his normal duties. There being no evidence to support that conclusion there is necessarily an error of law on the decision arrived at and the award is bad and has to be set aside.

With respect a vital and valid criticism that can be made against the award is that the Industrial Court had not at all shown awareness of the facts of the case. There had been a setting down of the contentions of the parties and of principles but there was no findings of facts to relate them to the contentions and principles. As was stated earlier there has been no investigation of the facts, no analysis of the facts, no finding of facts. No reasons were given as to why the court gave the award in the terms that it did. The bank had contended before the Industrial Court that the duties and functions performed in the acting or relief capacity (never fully) are part of the existing terms of service and this was an issue the Industrial Court had to determine. There is nothing to indicate that it had done so. As was pointed out by Edgar Joseph J in *Viking Askin Sdn Bhd* that while there is power on the part of the Industrial Court to create new rights and obligations - a power derived under sub-ss. (4), (5) and (6) of s. 30 of the Act - "it is a power which must be exercised reasonably nor arbitrarily". To my mind, there were important and basic issues of facts raised for the Industrial Court for it to show that it had with full awareness focused on these issues and had properly dealt with them before reaching on the terms of the award that it gave. In the context of this case reasons should have been given to show that. Unfortunately this was not done by the court and even the relief allowance that it awarded cannot be considered as not being flawed.

I do not think it is necessary to consider the other challenges made by the bank against the award.

Certiorari to issue to quash the award. Costs to the bank.